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No. 86-6139

In The
Supreme Court of the United States
October Term, 1986

CLARA WATSON,
Petitioner,

v.

FORT WORTH BANK & TRUST,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE EMPLOYMENT LAW CENTER, AND THE CENTER FOR LAW IN THE PUBLIC INTEREST AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

Amicus NAACP Legal Defense and Educational Fund, Inc. is a New York nonprofit organization that has litigated numerous cases on behalf of black persons seeking vindication of their civil rights, including *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Amicus Mexican American Legal Defense and Educational Fund, headquartered in Los Angeles, is a national civil rights organization that has brought various lawsuits on behalf of Latinos subject to discrimination in employment, public education, voting rights and other areas of public life. Amicus Employment Law Center, a project of the Legal Aid Society of San Francisco, has represented women and minorities in nu-

merous employment discrimination cases, including *California Federal Savings and Loan Association v. Guerra*, — U.S. —, 107 S.Ct. 683 (1987). Amicus Center for Law in the Public Interest is a non-profit corporation located in Los Angeles that for many years has prosecuted civil rights and public interest lawsuits, including employment discrimination class actions on behalf of women and minorities. Letters from the parties consenting to the filing of this brief have been filed with the Court.

INTRODUCTION

The Court granted certiorari to consider whether an employer's selection or promotion practices may be insulated from disparate impact scrutiny under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982 ed. & Supp. III), simply because they are subjective. Amici will address the merits of the issue so as to respond to the arguments made by the United States in its amicus curiae brief supporting the petition for certiorari.

Preliminarily, however, we have grave doubts that this important legal issue is properly presented by the case now before the Court. The record reflects that the petitioner relied upon disparate treatment analysis in the trial court, and could not prove a case of denial of promotions based on disparate impact.[1] Even if this Court were to

[1]The evidence presented at trial was typical of a disparate treatment case. Petitioner testified as to her qualifications and the fact that she had applied for three promotions; the defendant presented evidence that purported to establish legitimate, non-discriminatory reasons for each promotion action. Those reasons focused on the relative qualifications of the persons selected and the legitimacy of the employer's actions. Evidence was also presented showing a low hire rate and slower promotion rate for blacks.

The district court found—and those findings are not challenged here—that throughout the relevant time period, the respondent employed a total of only 15 blacks, and that at any one time, the number of blacks employed never exceeded eight.

(Continued on following page)

hold that disparate impact analysis should be applied to subjective employment practices, as we urge below, the petitioner would be unable to establish a violation of Title VII on that basis. Accordingly, it is appropriate to dismiss certiorari as improvidently granted.

Should the Court reach the merits in this—or another—case, amici urge the Court to reject the government's proposed exemption for subjective employment practices.[2]

(Continued from previous page)

The particular complaint of the plaintiff is that she was discriminatorily denied promotions on three occasions. The district court further found that, in addition to plaintiff, only one other black had applied for promotions given to whites. Thus, blacks applied for and were denied a total of five promotions. Memorandum Opinion of District Court at 13 (Nov. 21, 1984); Testimony of Sylvia Harden, Tr. Vol. III, at 98-99. Such numbers do not permit a showing of disparate impact, since they cannot establish any pattern of the effect of an employment practice. The government agrees. *See* Brief for the United States as Amicus Curiae, at 20 n.16.

[2]The line between subjective and objective employment practices is not as bright as the government suggests.

> [A]lmost all criteria necessarily have both subjective and objective elements. For example, while the requirement of a certain test score may appear "objective," the choice of skills to be tested and of the testing instruments to measure them involves "subjective" elements of judgment. Such apparently "subjective" requirements as attractive appearance in fact include "objective" factors. Thus the terms represent extremes on a continuum . . . .

Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1485 (9th Cir. 1987) (*en banc*). In the words of one commentator, "[m]ost employment decisions contain some element of subjectivity." Comment, Applying Disparate Impact Theory to Subjective Employee Selection Procedures, 20 *Loy. L.A.L. Rev.* 375, 400 (1987). *See also* Lamber, Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory, 1985 *U. Ill. L. Rev.* 869, 874 n.14 ("In a sense, all decisions—from the pure hunch to the choice of using a clearly defined objective rule—involve discretion."). *Cf. Nation v. Winn-Dixie Stores, Inc.*, 567 F.Supp. 997, 1005 n.20 (N.D. Ga.) ("[I]t is especially difficult in the context of promotions to formulate employer decisionmaking criteria that are completely free of subjectivity."), *aff'd on reh'g*, 570 F.Supp. 1473 (N.D. Ga. 1983).

Such an exemption is directly contrary to Title VII's plain meaning, the prior decisions of this Court, specific legislative history, the Justice Department's own guidelines on employee selection, and the prophylactic purpose of the statute.

The government would permit an employer to make personnel decisions on the basis of "subjective" criteria—even if those criteria are "unrelated to measuring job capability," *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), and result in the disproportionate exclusion of minorities and/or women—so long as those decisions are made in good faith. The alternative, it is argued, would be to interfere with the employer's management prerogatives. *See* Brief for the United States as Amicus Curiae at 14-17. Yet management prerogatives are necessarily circumscribed by Title VII's essential purpose of "achiev[ing] equality of employment opportunit[y]." *Griggs*, 401 U.S. at 429. They cannot be permitted to shield discrimination, "subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Accordingly, this Court has consistently rejected arguments founded on the notion of employer discretion where that discretion would be exercised in a manner contrary to Title VII's prohibitory pronouncements. In *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), for example, the Court held that Title VII applied to the partnership decisions of a law firm, notwithstanding the possible infringement on that firm's rights of expression and association. *Cf. id.* at 80 n.4 (Powell, J., concurring) ("[L]aws that ban discrimination . . . may impede the exercise of personal judgment . . . . "). And last term, the Court rejected government arguments based on policy considerations relating to the prerogatives of unions. *Goodman v. Lukens Steel Co.*, — U.S. —, —, 107 S.Ct. 2617, 2624-25 (1987).[3] Whether or not such prerogatives are diminished by the application of disparate

[3]See Brief for the United States as Amicus Curiae at 19-24, *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987).

impact analysis to subjective employment practices, "Congress has made the choice, and it is not for us to disturb it." *Chandler v. Roudebush*, 425 U.S. 840, 864 (1976) (rejecting government's proffered interpretation of Title VII in face of plain meaning of statute and its legislative history).

SUMMARY OF ARGUMENT

"A disparate-impact claim reflects the language of § 703(a)(2)," *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). The plain terms of the statute provide absolutely no basis for exempting the entire category of subjective employment practices from the scope of § 703(a)(2). Had Congress intended to exempt subjective criteria, it well knew how to do so. *See Hishon v. King & Spalding*, 467 U.S. 69, 77-78 (1984) ("When Congress wanted to grant an employer . . . immunity, it expressly did so.").

The legislative history of the 1972 amendments to Title VII demonstrates that Congress ratified and endorsed the Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and contemplated its application to all employment practices, including subjective criteria, having a discriminatory impact on minorities and women. In particular, Congress specifically indicated, with respect to the federal government's personnel system, that *Griggs* applied to its subjective selection criteria. The administrative regulations issued by the agencies charged with enforcement responsibility confirm that Congress intended the disparate impact analysis to apply to "the full range of assessment techniques from traditional paper and pencil tests . . . through informal or casual interviews and unscored application forms." 29 C.F.R. § 1607.16Q (1986).

Limiting § 703(a)(2) disparate impact analysis to objective criteria would frustrate Title VII's primary goal of "achiev[ing] equality of employment opportunities." *Griggs*, 401 U.S. at 429. Moreover, the exclusion of subjective practices from disparate impact analysis would

make employers less inclined to "'self-examine and self-evaluate [their] employment practices,'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)), as contemplated by Title VII.

ARGUMENT

The government would exempt from disparate impact analysis all practices and procedures of a subjective nature —*i.e.*, discretionary selection devices such as evaluative interviews, performance appraisals, and essay examinations. Application of the disparate impact analysis would be limited to objective criteria—*i.e.*, non-discretionary selection devices such as height and weight requirements, *see Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977), mechanically scored intelligence tests, *Griggs v. Duke Power Co.*, 401 U.S. 424, 427-28 (1971), and diploma requirements, *id.*[4] Accordingly, the government would make intent the sole focus of most Title VII litigation. *See supra* note 2. But just like their non-discretionary counterparts, discretionary selection criteria can "operate as 'built-in headwinds' for minority groups [and women]," *Griggs*, 401 U.S. at 432, even in the absence of discriminatory intent. *See infra* at 24-25.[5] Whether an employment practice is objective or subjective should not and cannot "provide a line

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[4]*Cf.* W. Cascio, *Applied Psychology in Personnel Management* 129 (2d ed. 1982) ("The method of scoring a test may be objective or non-objective. In the former case, there are fixed, impersonal standards for scoring . . . . On the other hand, the process of scoring essay tests and certain types of personality inventories . . . may be quite subjective . . . ."); D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 1.23 (1980 & 1986 Supp.) (distinguishing between "nondiscretionary criteria" and criteria that are "discretionarily . . . applied"). *But see supra* note 2.

[5]Under the government's proposed exemption for subjective criteria, a non-discretionary requirement of supervisory experience might be shielded simply by taking that experience into account through a discretionary requirement of "leadership" ability. *See infra* at 26.

of demarcation to guide courts in choosing the appropriate analytic tool in a Title VII discrimination case." *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (9th Cir. 1987) (*en banc*).

I. THE LANGUAGE OF TITLE VII SUPPORTS THE APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE CRITERIA

As the Court noted in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982): "A disparate-impact claim reflects the language of § 703(a)(2)." Nothing in the statute can be read to exclude subjective employment practices from that section's reach.

A. Section 703(a)(2) Is a Crucial Element of Title VII's Comprehensive Enforcement Scheme

The two subparts of § 703(a) reflect the intent of Congress to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431.

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Section 703(a)(2) is concerned with "the *consequences* of employment practices," *Griggs*, 401 U.S. at 432 (emphasis in original), for which disparate impact analysis is appropriate.

The § 703(a) enforcement scheme evidences no intent to restrict a plaintiff to subpart (1) as an exclusive remedy

for any category of employment practices. Section 703(a) is a comprehensive framework, embracing all forms of employment discrimination by providing overlapping guarantees against both the overt discrimination to which § 703 (a)(1) is primarily directed,[6] as well as the denial of equal employment "opportunities" with which § 703(a)(2) is concerned, *Teal*, 457 U.S. at 449; *Griggs*, 402 U.S. at 431.

B. Section 703(a)(2) Draws No Distinctions Among Different Employment Practices

Section 703(a)(2), by its terms, prohibits practices that "limit, segregate, or classify . . . employees or applicants . . . *in any way*" so as to deprive an individual of employment opportunities on the basis of race, sex, or some other protected characteristic. 42 U.S.C. § 2000e-2 (a)(2) (emphasis added). It nowhere suggests that subjective practices should be exempted, and indeed, draws no distinction between objective and subjective employment criteria. Accordingly, the government's attempt to draw such a distinction should be rejected: "'[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Chandler v. Roudebush*, 425 U.S. at 848 (quoting *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)). The most natural reading of § 703(a)(2) is that all employment practices are covered by its broad prohibition and may come under disparate impact scrutiny. As this

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[6] A violation of § 703(a)(1) may also be established by showing that a practice is facially discriminatory. *See City of Los Angeles v. Manhart*, 435 U.S. 702 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Several lower courts have held that disparate impact challenges may also be brought under § 703(a)(1). *See, e.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1127 (7th Cir. 1987); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984); *cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977) (The Court "need not decide whether . . . it is necessary to prove intent to establish a prima facie violation of § 703(a)(1).").

Court noted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (emphasis added): "Congress intended to prohibit *all* practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."

C. The Asserted Exemption From § 703(a)(2) Is Found Nowhere in the Language of Title VII, and Must Be Rejected

The government would exempt a whole category of employment practices from § 703(a)(2)'s coverage, though no such exemption appears in the language of that section or the other provisions of Title VII. That absence of textual support is telling: "When Congress wanted to grant an . . . immunity, it expressly did so." *Hishon v. King & Spalding*, 467 U.S. 69, 77-78 (1984) (rejecting assertion of immunity for partnership decisions); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) ("Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale.").

For example, Congress specifically exempted the use of bona fide occupational qualifications based on religion, sex or national origin, § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1), *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971); bona fide seniority or merit systems, § 703(h), 42 U.S.C. § 2000e-2(h), *see Teamsters*, 431 U.S. at 350-56 (exemption applying to § 703(a)(2) cases only); ability tests "not designed, intended or used to discriminate," § 703(h), 42 U.S.C. § 2000e-2(h), *see Griggs*, 401 U.S. at 433-36; and certain preferential treatment of Indians, § 703(i), 42 U.S.C. § 2000e-2(i), *see Morton v. Mancari*, 417 U.S. 535, 545 (1974). Congress also provided express exemptions for the employment practices of Indian tribes and certain agencies of the District of Columbia, § 701(b)(1), 42 U.S.C. § 2000e(b)(1); small businesses and bona fide private membership clubs, § 701(b)(2), 42 U.S.C. § 2000e(b)(2); certain religious organizations, § 702, 42 U.S.C. § 2000e-1; and certain religious educational institutions, § 703(e)(2), 42 U.S.C. § 2000e-2(e)(2).

Here, the government would have this Court *create*—where Congress did not—a § 703(a)(2) exemption for subjective employment practices and exclude them from disparate impact scrutiny. Because that asserted exemption falls outside the express language of Title VII, however, it must be rejected. *See Hishon*, 467 U.S. at 77-78.

II. THE COURT'S DECISIONS SUPPORT APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE CRITERIA

This Court's decisions are consistent with the above-proffered construction of § 703(a)(2). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 432-33 (1975), the Court acknowledged difficulty in determining whether subjective appraisals, executed as part of a validation study, had measured job-related ability. The same concern exists when such appraisals constitute the employment practice being challenged. Implicit in the Court's opinion is the recognition that, notwithstanding a lack of discriminatory intent, minorities and women might be adversely affected by discretionary practices that do not closely relate to job capability.

While the Court has not specifically discussed the application of disparate impact analysis to subjective employment practices, it has never excluded any practice from the scope of § 703(a)(2).[7] Moreover, the Court has con-

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[7]Those practices "clearly fall[ing] within the literal language of § 703(a)(2)," *Teal*, 457 U.S. at 448, include written examinations, *Albemarle*, 422 U.S. at 425; *Griggs*, 401 U.S. at 433, educational requirements, *id.*, height and weight requirements, *Dothard*, 433 U.S. at 328-29, a policy against employing persons who use narcotic drugs, *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-87 (1979), and a residual category of practices that perpetuate the effects of prior discrimination, *Teamsters*, 431 U.S. at 349 ("One kind of practice 'fair in form, but discriminatory in operation' is that which perpetuates the effects of discrimination."). Of course, within such a residual category, one would expect to find subjective, as well as objective employment practices. *See Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir.) ("[e]lusive [and] purely subjective standards" may effectively perpetuate past discrimination), *cert. denied*, 409 U.S. 982 (1972).

sistently spoken in broad-brush terms such as "practices," "criteria," and "barriers"--terms that clearly encompass both subjective and objective practices—in discussing and applying the disparate impact theory.[8]

That subjective practices are susceptible to challenge under the disparate treatment analysis of § 703(a)(1) does not mean that they are *not* susceptible to challenge under the disparate impact analysis of § 703(a)(2). As the Court acknowledged in *Teamsters*, 431 U.S. at 335 n.15, "[e]ither theory may, of course, be applied to a particular set of facts." An objective selection criterion may be discriminatory either because its adoption is traceable to a discriminatory motive,[9] or because the practice has an unjustified discriminatory effect. The same is true for a subjective selection criterion. The government, without mentioning *Teamsters*, argues that this Court expressly de-

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[8]*See, e.g., Griggs*, 401 U.S. at 430 ("practices, procedures, or tests"); *id.* at 431 ("criteria for employment"); *id.* at 432 ("any given requirement"); *Dothard*, 433 U.S. at 328 ("arbitrary barrier to equal employment opportunity"); *Beazer*, 440 U.S. at 584 ("an employment practice has the effect of denying . . . equal access to employment opportunities"); *Teal*, 457 U.S. at 448 ("nonjob-related barrier"). *Cf. General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("Title VII prohibits discriminatory employment *practices*," including "subjective decisionmaking processes.") (emphasis in original).

[9]*See, e.g., United States v. Georgia Power Co.*, 695 F.2d 890, 893 (5th Cir. 1983) (non-discretionary seniority system "maintained out of an unlawful purpose"); *Sears v. Bennett*, 645 F.2d 1365, 1374 (10th Cir. 1981) (seniority system "maintained with the purpose of discriminating against black employees"), *cert. denied*, 456 U.S. 964 (1982); *Chicago Police Officer's Ass'n v. Stover*, 552 F.2d 918, 921-22 (10th Cir. 1977) (case remanded for determination of whether employment test having discriminatory impact was adopted with discriminatory intent); *cf. Wallace v. City of New Orleans*, 654 F.2d 1042, 1047 (5th Cir. 1981) (police department's adoption of height/weight requirement held not a product of intentional discrimination); *Hicks v. Crown Zellerbach Corp.*, 319 F.Supp. 314, 318 (E.D. La. 1970) ("There was no claim that defendants had adopted the tests for the express purpose of capitalizing on these differential passing rates . . . .").

clined to apply § 703(a)(2) to discretionary employment practices in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). *See* Brief for the United States as Amicus Curiae at 11-12. A close look at those cases, however, demonstrates otherwise.

In *McDonnell Douglas*, there was simply no assertion of disparate impact. The plaintiff's claims were limited to disparate treatment and retaliation under §§ 703(a)(1) and 704, *see* 411 U.S. at 796-98, 807; a § 703(a)(2) claim was never made. Indeed, the plaintiff made no effort to establish any group-wide effects of the practice at issue. *See id.* at 805. Thus, the case neither holds nor implies that § 703(a)(2) disparate impact analysis is inapplicable to subjective practices.

Nor does *Furnco* support such a contention.[10] The Court granted certiorari "to consider important questions raised by th[e] case regarding the exact scope of the prima facie case under [the] *McDonnell Douglas* [disparate treatment approach] and the nature of the evidence necessary to rebut such a case." *Id.* at 569. The Court agreed with the court of appeals that the plaintiff had made out a prima facie case of disparate treatment, but reversed on the issue of the defendant's burden of rebuttal. The government's assertion that the Court "expressly refused to apply disparate impact analysis," Brief for the United States as Amicus Curiae at 12, is incorrect: A disparate impact claim was not before the Court. While the Court

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[10] In *Furnco*, several black applicants for employment challenged, on both disparate impact and disparate treatment grounds, an employer's practice of hiring only those applicants who were known by the superintendent or who were otherwise recommended. The district court rejected both claims, finding, on the impact claim, that blacks as a group were not disproportionately excluded by the employer's selection process. 438 U.S. at 572. The court of appeals reversed on the disparate treatment claim, *id.* at 573-74, and the employer sought and petitioned for certiorari only on disparate treatment issues. *See id.* at 574 n.6 (questions presented in petition for certiorari).

noted that the selection procedure at issue in *Furnco* "did not involve employment tests which we[re] dealt with in *Griggs* . . . and in *Albemarle* . . ., or particularized requirements such as the height and weight specifications considered in *Dothard* . . .," *id.* at 575 n.7, it cannot be concluded that the Court intended this bare listing to announce a decisional rule restricting use of the disparate impact analysis to objective criteria.[11] Although the government fails to mention it, the Court also noted, in the same discussion, that *Furnco* "was not a . . . case like *Teamsters* . . .," *id.*, in which the employment practices at issue were discretionary in nature. *See Teamsters*, 431 U.S. at 338 n.19. There is, in short, nothing in *Griggs* or its progeny that would limit use of the disparate impact analysis to objective criteria.

III. LEGISLATIVE HISTORY SANCTIONS APPLICATION OF THE DISPARATE IMPACT ANALYSIS TO SUBJECTIVE PRACTICES

While "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII" in 1964, *Teamsters*, 431 U.S. at 335 n.15, "it was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,'

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[11] First, the complained-of practice in *Furnco* was itself nondiscretionary or objective in nature: The employer simply "refus[ed] to consider . . . applications at the gate." *Furnco*, 438 U.S. at 576 n.8. Second, while the employment practices in *Griggs*, *Albemarle*, and *Dothard* all might have been susceptible to disparate treatment analysis, in none of those cases would the *McDonnell Douglas* approach have been appropriate. To make out a prima facie case under *McDonnell Douglas*, the plaintiff must show "that he . . . was *qualified* for [the] job" at issue. 411 U.S. at 802 (emphasis added). However, the plaintiffs in *Griggs*, *Albemarle*, and *Dothard* brought suit because discriminatory selection criteria had rendered them *"un*qualified." Thus, perhaps the Court meant only to suggest that the case before it was (unlike *Griggs*, *Albemarle*, and *Dothard*) susceptible to the *McDonnell Douglas* approach, and not that the plaintiff was foreclosed from making a disparate impact challenge.

110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it is to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." *United Steelworkers v. Weber*, 443 U.S. 193, 203 (1979). By 1972, when it enacted several major amendments to Title VII, Congress fully understood that the opening of those opportunities could not be achieved by the eradication of just intentional discrimination. *See* S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971) [hereinafter "S. Rep. No. 415"] ("[W]here discrimination is institutional, rather than merely a matter of bad faith, . . . corrective measures appear to be urgently required."); *see also* 117 Cong. Rec. 32103 (Sept. 16, 1971) (remarks of Rep. Fraser) ("Often the source of discriminatory patterns is inertia rather than deliberate intent. But that does not lessen the injustice and economic damage done to the recipients.").

The 1972 amendments, among them a broadening of § 703(a)(2) to include "applicants for employment," *see* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 109, were the result of a thorough review by Congress of both the statute and the existing case law, including this Court's *Griggs* decision. Indeed, "[t]he legislative history . . . demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*," *Teal*, 457 U.S. at 447 n.8, and contemplated its application to all employment practices having a discriminatory effect.[12]

In extending to state and municipal employees the protections of Title VII—"as interpreted by *Griggs*," *id.*

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[12]This Court has relied upon the 1972 legislative history not only in *Teal*, 457 U.S. at 447 n.8, but also in *Franks*, 424 U.S. at 764 n.21, 796 n.18 (Powell, J., concurring in part and dissenting in part), *Albemarle*, 422 U.S. at 420-21, and *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). *Compare Teamsters*, 431 U.S. at 354 n.39 (little, if any, weight given to 1972 legislative history in light of clear language of § 703(h), which was unaffected by 1972 amendments).

at 449—Congress was concerned with "*both* institutional and overt discriminatory practices," and specifically identified "stereotyped misconceptions by supervisors regarding minority group capabilities" as having perpetuated the effects of past discrimination. H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971) [hereinafter "H.R. Rep. No. 238"] (emphasis added); *see also* S. Rep. No. 415, at 10. Congress also relied upon a report authored by the United States Commission on Civil Rights, which specifically identified "supervisory ratings" as a "[b]arrier[] to equal opportunity." U.S. Commission on Civil Rights, For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment 119 (1969), *reprinted in* 118 Cong. Rec. 1817 (1972). *See Teal*, 457 U.S. at 449 n.10.

The extension of Title VII to federal employees was grounded in similar concerns about both subjective and objective practices. Quoting the presidential memorandum accompanying Executive Order 11478, both Committee reports declared that "discrimination of *any* kind based on factors not relevant to job performance must be eradicated completely from Federal employment." H.R. Rep. No. 238, at 22-23; S. Rep. 92-415, at 13 (emphasis added).[13]

Indeed, legislative history is particularly instructive with regard to the selection procedures of the federal government. At the Senate hearings, Rep. Fauntroy of the District of Columbia testified concerning the numerous complaints received from his constituents regarding discrimination by federal agencies. He was particularly critical of the Civil Service Commission's focus on attempting to find supervisors with malicious intent "rather than focusing on personnel policies that have the inherent ef-

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[13]Congress was well aware of the widespread existence of discretionary employment practices in the federal government. *See* H.R. Rep. No. 238, at 24 (referring to employees' fears that administrative complaints "will only result in antagonizing their supervisors and impairing any hope of future advancement."); S. Rep. No. 415, at 14 (same).

fect of discriminating against black, Spanish surname and women employees."[14]

In the course of the hearings in the House of Representatives on what was to become the 1972 Act, there was a specific focus on the question of whether the Civil Service Commission had validated *all* of its selection procedures and instruments. Thus, the Chair of the House Committee asked not only whether Civil Service tests and written examinations had been validated, but also if other selection techniques had been validated.[15] The Civil Service Commission, in reply, identified selection techniques other than tests as including the evaluation of the experience and training of applicants or employees, and went on to state: "In a few instances interviews are a part of the examination process. In other cases, and in the promotion program particularly, the appraisals of an individual's job performance and potential are considered in relation to the job to be filled."[16] With regard to *all* these qualification requirements, the Civil Service Commission claimed that: "The showing of direct relationships of job demands to the qualification requirements . . . is fully in conformity with the Supreme Court decision in *Griggs v. Duke Power Co.*"[17]

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[14]*Equal Employment Opportunities Enforcement Act of 1971*, Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.2515, S.2617, and H.R. 1746, Oct. 4, 6 and 7, 1971, p. 205.

[15]Letter to John H. Dent, Chairman, General Subcommittee on Labor, Committee on Education, and Labor, U.S. House of Representatives, from Irving Kator, Assistant Executive Director, United States Civil Service Commission, April 23, 1971, reproduced in *Equal Employment Opportunity Enforcement Procedures*, Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746, March 3, 4, and 18, 1971, pp. 382-83.

[16]*Id.* at 383.

[17]*Id.* As part of its submission, the Civil Service Commission introduced into the record the text of the 1969 Federal Personnel Manual Supplement (FPM) 335-1. Evaluation of Em-

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Given the criticisms of the Commission it had heard, Congress was understandably skeptical. Therefore, the House and Senate reports echoed Representative Fauntroy's criticisms and instructed:

> The Commission should be especially careful to ensure that its directives issued to Federal Agencies address themselves to the various forms of systematic discrimination in the system. . . . It apparently has not fully recognized that the general rules and procedures that it his promulgated may in themselves constitute systematic barriers to minorities and women.

Sen. Report No. 92-415, 92d Cong., 1st Sess., 1971, p. 14. The Senate report goes on to state:

> The Committee expects the Civil Service Commission to undertake a thorough reexamination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.

Id. at 14-15. *See also* H. Rep. No. 92-238, 92d Cong., 1st Sess., 1971, pp. 24-25. In short, it is clear beyond any reasonable question that in 1972 Congress specifically mandated that the *Griggs* rule apply to *all* forms of selection and qualification requirements.

Finally, when Congress enacted the amendments to Title VII, the courts had uniformly extended disparate im-

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ployees for Promotion and Internal Placement. *Id.* at 336-62. The supplement required agencies to "give careful consideration" to which of the available evaluation instruments "are relevant to the job and are sound and dependable measures of the qualifications needed." *Id.* at 337. The FPM went on to discuss various evaluation instruments, including not only written and other types of tests, but also interviews and procedures for appraisals and assessment of potential. *Id.* at 340-42. With regard to *all* evaluation instruments, whether objective, subjective, or mixed, the FPM required that an agency determine the effectiveness of the instrument through establishing its validity and discussed and defined the three types of validity: content, construct and criterion related. *Id.* at 342-43. Thus, the Civil Service Commission attempted to convince Congress that *all* of the methods used in the federal service to select employees for jobs at all levels had been fully validated.

pact scrutiny to subjective employment practices. And "in language that could hardly be more explicit," *Franks v. Bowman Transportation Co.*, 424 U.S. at 764 n.21, the section-by-section analyses submitted to both Houses "confirm[ed] Congress' resolve to accept prevailing judicial interpretations regarding the scope of Title VII," *Local 28 of Sheet Metal Workers' International Association v. EEOC*, — U.S. —, —, 106 S.Ct. 3019, 3047 (1986): "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that *the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.*" 118 Cong. Rec. 7166, 7564 (1972) (emphasis added).[18]

Congressional awareness of cases applying disparate impact analysis to subjective employment practices extended at least to *United States v. Sheet Metal Workers International Association, Local Union No. 36*, 416 F.2d 123 (8th Cir. 1969), cited by the House Committee Report as having "contributed significantly to the federal effort to combat employment discrimination," H.R. Rep. No. 238, at 13 n.14, and *Local 53 of the International Association of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), cited by both the House and Senate Committee Reports as support for the "complex and pervasive" nature of employment discrimination, H.R. Rep. No. 238, at 8 n.2; S. Rep. No. 415, at 5 n.1.[19] *Sheet Metal Workers* involved

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[18]Moreover, with respect to the new § 706(a), which gave the EEOC more power to prevent persons from engaging in the employment practices made unlawful by §§ 703 and 704, see 86 Stat. at 104, the section-by-section analyses expressly stated that "the unlawful practices encompassed by [§§] 703 and 704, which were enumerated in 1964 in the original Act, *and as defined and expanded by the courts* remain in effect." 118 Cong. Rec. 7167, 7564 (1972) (emphasis added).

[19]In explaining the "complex and pervasive" nature of employment discrimination, the House and Senate Committee Reports also cited Cooper & Sobol, Seniority and Testing Under

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a union's practice of administering an examination, "partially subjective in nature," with "no established [pass/fail] standard." 416 F.2d at 136. The Eighth Circuit thought "it . . . essential that journeymen's examinations be objective in nature [and] that they be designed to test the ability of the applicant to do that work usually required of a journeyman." *Id.*

> In reaching this conclusion, we do not necessarily accept the government's contention that [the test administrator], as an individual, would, because of his past participation in the exclusionary policies of the Local, discriminate against Negroes in giving and grading journeymen's examinations. We are not here concerned with the individual who gives and grades the examination. *We are concerned rather with the system, the nature of the examination, its objectivity and its susceptibility to review.*

Id. (emphasis added). In *Vogler*, the Fifth Circuit also focused on the *effects* of subjective criteria. A district court order requiring a union to develop objective criteria for membership "based on industry need" was upheld because subjective criteria—calling for applicants to obtain recommendations from present members and to receive a favorable vote of a majority of the membership—caused the exclusion of blacks. *See* 407 F.2d at 1049-50, 1054-55.[20]

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Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 *Harv. L. Rev.* 1598 (1969). *See* H.R. Rep. No. 238, at 8 n.2; S. Rep. No. 415, at 15 n.1. That article argued that "[i]f any subjective procedure has a systematic effect in disadvantaging blacks, the employer should be required to show the same justification as for a test or other objective procedure." 82 *Harv. L. Rev.* at 1677.

[20]The other courts that had considered the issue prior to Congress' enactment of the amendments to Title VII agreed that disparate impact analysis could be applied to subjective practices. *See United States v. Dillon Supply Co.*, 429 F.2d 800, 802, 804 (4th Cir. 1970) (district court committed reversible error by failing to consider that "[p]ractices, policies or pat-

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Inasmuch as the contemporaneous case law included not only *Griggs*, but also lower court decisions applying § 703(a)(2) disparate impact analysis to subjective practices, Congress' express intent in 1972 firmly compels that application today.

IV. THE ADMINISTRATIVE INTERPRETATION OF TITLE VII SUPPORTS THE APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT PRACTICES

Further support for the application of disparate impact analysis to subjective practies is found in the administrative regulations concerning Title VII, which have consistently required the validation of all selection procedures. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1986), "based upon principles which have been consistently upheld by the courts, the Congress, and the agencies," 43 Fed. Reg. 38290 (1978), contemplate application of disparate impact analysis to "any selection procedure," *id.* at § 1607.3, including "the full range of assessment techniques from traditional paper and pencil tests . . . through informal or casual interviews and unscored application forms." *Id.* at § 1607.16Q. And as the enforcing agencies' "administrative interpretation of

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terns, even though neutral on their face, may operate to segregate and classify on the basis of race at least as effectively as overt racial discrimination" where "the government offered proof of a decentralized system of hiring and assignment which vested broad authority on the supervisors of largely segregated departments and which had no uniform or objective standards for hiring or assignment"); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971) (finding that "jobs were made available to whites rather than to blacks" in part because "[t]here were no fixed or reasonably objective standards and procedures for hiring"); *Rowe v. General Motors Co.*, 457 F.2d 348, 355, 359 (5th Cir. 1972) (although employer had no "deliberate purpose to maintain or continue practices which discriminate," court struck down "promotion/transfer procedures which depend[ed] almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman").

the Act,"[21] the Guidelines are "entitled to great deference." *Albemarle*, 422 U.S. at 431; *Griggs*, 401 U.S. at 433-34; *see also Local 28 of Sheet Metal Workers' International Association v. EEOC*, — U.S. at —, 106 S.Ct. at 3044-45 (Court's interpretation of Title VII "confirmed by the contemporaneous interpretations of . . . both the Justice Department and the EEOC, the two federal agencies charged with enforc[ement responsibility.]"); *Local No. 93, International Association of Firefighters v. City of Cleveland*, — U.S. —, —, 106 S.Ct. 3063, 3073 (1986) (proffered construction of Act supported by EEOC guidelines). *Compare General Electric Co. v. Gilbert*, 429 U.S. 125, 141-45 (1976) (EEOC regulations not followed because they contradicted agency's earlier positions and were inconsistent with Congress' plain intent); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93-94 (1973) (same).[22]

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[21]The Guidelines were jointly adopted in 1978 by the Department of Justice, as well as the EEOC, the Civil Service Commission, and the Department of Labor. 29 C.F.R. § 1607.1A. Section 713(a) of Title VII authorizes the EEOC "to issue, amend or rescind suitable procedural regulations to carry out the provisions of [the statute]." 42 U.S.C. § 2000e-12(a).

[22]According to the Uniform Guidelines, a selection procedure having an adverse impact must be validated unless the employer "choose[s] to utilize alternative selection procedures in order to eliminate adverse impact." 29 C.F.R. § 1607.6A. No selection procedures are exempted from this requirement. The government, however, points out that "[t]here are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines," *id.* at § 1607.6B, and asserts that one such circumstance is the use of "informal or unscored selection procedure[s]." *Id.* at §1607.6B (1). The government then concludes that an employer need only "justify [the] continued use of [such] procedure[s] in accord with Federal law," *id.*, and that the articulation of a legitimate, nondiscriminatory reason suffices as the requisite justification. *See* Brief for the United States as Amicus Curiae at 19-20. This argument is a distortion of the Guidelines. First, the Guidelines also include "formal and scored procedures" as circumstances in which an employer cannot or need not utilize validation techniques. *See id.* at § 1607.6B(2). Second, the government

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In requiring applicaton of the disparate impact analysis to *all* selection procedures, the Guidelines track the now superseded administrative regulations upon which this Court relied in its affirmation of the disparate impact test in *Griggs*. The EEOC's 1966 and 1970 Guidelines,[23] which the Court treated "as [having] express[ed]

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has neglected to mention the first two clauses of § 1607.6B(1), which provide that an employer using an informal or unscored procedure should (1) "eliminate the adverse impact," or (2) "modify the procedure to one which is a formal, scored or quantified measure." Finally, the government's "belief" that the use of a selection procedure having a disparate impact may be justified by the mere articulation of a legitimate, nondiscriminatory reason is undermined by the questions and answers provided to explain the Guidelines:

> 36. How can users justify continued use of a procedure on a basis other than validity?
>
> A. Normally, the method of justifying selection procedures with an adverse impact and the method to which the Guidelines are primarily addressed, is validation. The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a "business necessity" for its continued use; therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of a selection procedure.

44 Fed. Reg. 11996, 12002 (1979). *Cf.* Comment, Applying Disparate Impact Theory to Subjective Employee Selection Procedures, 20 *Loy. L.A.L. Rev.* 375, 389 (1987) ("How to 'otherwise justify' . . . selection procedures remains an open question."). The government's proposed standard of justification would flout, rather than "accord" with, the federal law as announced in *Griggs*.

[23]The Guidelines on Employment Testing Procedures, issued in 1966, were not published in the Federal Register. They were superseded in 1970 by the Guidelines on Employee Selection Procedures, published at 35 Fed. Reg. 12333 (1970) (codified at 29 C.F.R. § 1607, superseded in 1978).

the will of Congress," *Griggs*, 401 U.S. at 434, interpreted Title VII to prohibit the use of any "test" that was discriminatory in operation and for which job-relatedness could not be established. 35 Fed. Reg. at 12334 (§ 1607.3). They defined the term "test" broadly, including within its scope such subjective practices as "scored interviews" and "interviewers' rating scales." *Id.* at 12334 (§ 1607.2). Elsewhere, the EEOC Guidelines recognized that "[s]election techniques other than tests," such as unscored "casual interviews" and "application forms," might also "have the effect of discriminating against minority groups." *Id.* at 12336 (§ 1607.13). Under those circumstances, the employer was required to validate the selection technique(s) at issue or to eliminate the disparate impact. *Id.*[24]

V. APPLICATION OF THE DISPARATE IMPACT ANALYSIS TO SUBJECTIVE PRACTICES FURTHERS THE PRIMARY PROPHYLACTIC PURPOSE OF TITLE VII

The application of § 703(a)(2) to subjective practices is entirely consistent with Title VII's central aim of "eliminating the effects of discrimination in the workplace." *Johnson v. Transportation Agency, Santa Clara County, Calif.*, — U.S. —, —, 107 S.Ct. 1442, 1451 (1987); *see also Teal*, 457 U.S. at 449 ("Congress' primary purpose was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."). It is also consistent with the statute's goal of en-

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[24]The Department of Labor, in its interpretation of Executive Order 11246, 33 Fed. Reg. 14392 (1968) (Employment Tests by Contractors and Subcontractors: Validation), similarly contemplated the validation of "*any* . . . performance measure used to judge qualifications for hire, transfer or promotion," including measures of "intelligence," "ability," "aptitudes," "knowledge and proficiency," as well as measures of "personality or temperament." *id.* at 14393 (§ 9). *See id.* at 14392 (§ 1(g)). Noting that "[s]election techniques other than tests may also be improperly used so as to have the effect of discriminating," the Department required that such techniques as "unscored interviews" and "unscored application forms" also be validated or adjusted to eliminate any disparate impact. *Id.* at 14393 (§ 10).

couraging employers to engage in voluntary self-examination of their employment practices, and will not unnecessarily or unreasonably diminish management prerogatives.

A. Title VII "Prohibits All Pactices in Whatever Form Which Create Inequality in Employment Opportunity"

While § 703(a)(2)'s broad proscription of discrimination in employment extends to *all* "practices, procedures, or tests neutral on their face, and even *neutral in terms of intent* . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability," *Griggs*, 401 U.S. at 430, 432 (emphasis added), the government would have plaintiffs prove intent in all challenges to subjective employment practices.

However, irrespective of an employer's good intentions, the use of subjective selection criteria may unfairly restrict employment opportunities for minorities and women. Subjective criteria leave substantial room for deeply ingrained, unconscious biases. As one commentator has written: "A supervisor [who is] judging a subordinate for promotion potential tends to look for traits [in the subordinate] which the supervisor feels he himself has. It is, of course, much easier for a Caucasian male to find such traits in other Caucasian males than in minorities and women." Stacy, Subjective Criteria in Employment Decisions Under Title VII, 10 *Ga. L. Rev.* 737, 739 (1976). *See also* R. Plumbley, *Recruitment and Selection* 145-46 (1981) (When a candidate's background and personality "appear to have been similar to his, the interviewer is presupposed to be biased in favour of him. . . . Judgment can be warped in this way without the interviewer being conscious of it.").[25] Moreover, the criteria themselves may

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[25]*See, e.g., Wilmore v. City of Wilmington*, 699 F.2d 667, 673-74 (3d Cir. 1983) (exclusion of blacks from administrative jobs a result of both conscious and unconscious biases); *Chance v. Bd. of Examiners*, 330 F.Supp. 203, 223 (S.D.N.Y. 1971) (white interviewers may have unconsciously discriminated against blacks and Hispanics), *aff'd* 458 F.2d 1167 (2d Cir. 1972).

be "unrelated to measuring job capability." *Griggs*, 401 U.S. 432; *see* D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 1.23, at 27 (1986 Supp.) ("[T]he defendant [may be] unbiased in evaluating the candidates and . . . the disparate impact [may be] caused by differences in characteristics of the candidates which, if measured objectively, would surely trigger a demand for proof of job relatedness.").[26] The Court has made precisely this point with respect to subjective performance appraisals put forth by the employer in *Albemarle* in an attempt to validate the objective test at issue there. The Court rejected the proffered correlation, however, because the "supervisors [had been] asked to rank employees by a 'standard' that was extremely vague and fatally open to divergent interpretations." 422 U.S. at 433. The Court had no way of knowing "whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify [the] testing system." *Id.* (emphasis in original).[27] Thus, the Court was rightly concerned that the subjective performance appraisals may not have measured job-related skills.

In order to achieve Congress' primary purpose of "achieving equality of employment 'opportunities' and removing 'barriers' to such equality," *Teal*, 457 U.S. at 449, the disparate impact analysis must be applied to all employment practices, both objective and subjective.

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[26]*See, e.g., Hawkins v. Bounds*, 752 F.2d 500, 504 (10th Cir. 1985) ("The record in this case contains no evidence . . . that the practice of totally discretionary detailing or its use in the promotion procedure [was] required by business necessity."); *Segar v. Smith*, 738 F.2d 1249, 1288 (D.C. Cir. 1984) (defendant never even attempted to showing job-relatedness of subjective experience requirement), *cert. denied*, 471 U.S. 1115 (1985); *Greenspan v Automobile Club*, 495 F.Supp. 1021, 1033 (E.D. Mich. 1980) (defendant failed to base evaluations on job analysis).

[27]*Cf.* B. Schlei & P. Grossman, *Employment Discrimination Law* 203 (2d ed. 1983) (. . . [T]he evaluative devise [should have] fixed content and call[] for discrete judgments.").

B. Title VII Requires That Employers "Self-Examine and Self-Evaluate Their Employment Practices"

The government's apparent concern for management prerogatives cannot obscure the fact that the exclusion of subjective criteria from disparate impact analysis would allow and even encourage employers to avoid the introspective assessment of their employment practices as contemplated by Title VII. Provided a convenient sanctuary in subjective criteria, employers would be loathe "'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate . . . the last vestiges of an unfortunate and ignominious page in this country's history.'" *Albemarle*, 422 U.S. at 418 (quoting *United States v. N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)). *Cf. United Steelworkers v. Weber*, 443 U.S. at 204 (Title VII "intended as a spur or catalyst" for employer efforts to eliminate effects of discrimination).

Rather than encourage self-examination, the government's proposed exemption for subjective practices would likely encourage blind adherence to those practices. *See Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985) ("Exclusion of . . . subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria."); D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 1.23, at 27 (1986 Supp.) ("exclusion of subjective criteria from review under the disparate impact model may encourage employers to rely less on objective criteria and more on general standards"). Indeed, to avoid the potential for disparate impact liability, employers would be inclined simply to consider objective criteria, such as a diploma requirement, within the context of a subjective interview. Yet "[i]t could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria." *Griffin v. Carlin*, 755 F.2d at 1525; *see also Atonio v. Wards Cove Packing Co.*, 810 F.2d at

1485 ("It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods.").[28]

Moreover, if any distinction *were* to be drawn between subjective and objective employment practices, one would expect the courts to scrutinize the former more carefully: Subjective employment practices are more susceptible to abuse than their objective counterparts. As the Ninth Circuit noted in *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981) (footnote omitted): "Subjective job criteria present potential for serious abuse and should be viewed with much skepticism. Use of subjective job criteria not only has, in many instances, a disparate impact on minorities, but also provides a convenient pretext for discriminatory practices."[29]

The government suggests that application of the disparate impact analysis to subjective criteria would impose

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[28]The government asserts that the application of disparate impact analysis to subjective criteria will force employers either to abandon such criteria or to eliminate statistical disparities through the adoption of quotas—because "subjective selection devices . . . may not be susceptible to validation or other such objective substantiation." Brief for the United States as Amicus Curiae at 15. As noted *infra* at 28-30, the premise for such an assertion is unfounded: subjective criteria are in fact susceptible to validation techniques. The government makes no mention of the fact that the *failure* to apply disparate impact analysis to subjective criteria will cause employers to abandon *objective* criteria for reasons unrelated to either the promotion of business necessity or the enhancement of equal opportunity in employment.

[29]*See also Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975) ("Nonobjective hiring standards are always suspect because of their capacity for masking racial [bias]."); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.) ("Greater possibilities for abuse . . . are inherent in subjective definitions of employment selection and promotion criteria."), *vacated on other grounds*, 423 U.S. 809 (1975); *Muller v. United States Steel Corp.*, 509 F.2d 923, 928 (10th Cir.) ("personal and subjective criteria encourage and foster discrimination"), *cert. denied*, 423 U.S. 825 (1975); Baldus & Cole, *Statistical Proof of Discrimination* § 1.23, at 27 (1986 Supp.) (subjective criteria are "more susceptible to abuse").

an insuperable burden on employers because of the unfeasibility of validating such criteria. *See* Brief for the United States as Amicus Curiae at 14-15. That suggestion is without merit. The industrial psychology profession universally recognizes that "[i]nterviewers are subject to the same standards of reliability and validity as apply to tests." W. Cascio, *Applied Psychology in Personnel Management* 31 (2d ed. 1982).[30] All selection procedures, whether objective or subjective, may be demonstrated to be job-related through acceptable validation procedures.[31]

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[30]"The [industrial psychology] profession has taken the stand that all selection systems, including subjective ones, can and indeed should be validated. The literature contains numerous descriptions of validity studies of the most commonly used subjective processes, such as interviews, the evaluation of biographical data, and assessment center techniques." Bartholet, Application of Title VII to Jobs in High Places, 95 *Harv. L. Rev.* 947, 988 (1982). *See also* Arvey & Campion, The Employment Interview: A Summary and Review of Recent Research, 35 *Personnel Psychology* 281 (1982) ("Industrial and organizational psychologists have been studying the employment interview for more than 60 years in an effort to determine the reliability and validity of judgment based on the assessment device and also to discover the various psychological variables which influence these judgments."); W. Cascio, *Applied Psychology in Personnel Management* 31 (2d ed. 1982) ("[R]eliability and validity analyses [of interviews] can easily be made by accurately maintaining . . . records [of information gathered, action taken, and predictions of future performance].").

[31]*See generally* Doverspike, Barrett & Alexander, The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness, 9 *Law & Psychology Rev.* 35 (1985). The *Standards for Educational and Psychological Testing* (1985), jointly issued by the American Psychological Association, the American Education Research Association and the National Council on Measurements in Education, state that validity is the most important consideration in evaluating tests, *id.* at 9 ("Technical Standards for Test Construction and Evaluation"), and broadly define tests to include all "evaluative devices," as well as standardized ability instruments. *Id.* at 3. *See also* Guion, Recruiting, Selection and Job Placement, in *Handbook of Industrial and Organizational Psychology* 799 (M. Dunnette ed. 1983) ("[S]pecific items of information drawn from interviews [and] global judgments made by interviewers and others must be considered as "tests").

That the subjective elements of a promotion or hiring system can be validated is further evidenced by the government's own experience. The standard process for selecting federal employees for competitive positions contains a number of subjective elements, including the use of performance evaluations, interivews, and recommendations.[32] Nevertheless, the Office of Personnel Management requires, as did the Civil Service Commission before it, *see supra* at 16, that federal agencies, where feasible, validate all selection procedures and standards—including subjective criteria--according to the Uniform Guidelines on Employee Selection Procedures. *See* Federal Personnel Manual, Chap. 335, Supplement 335-1, subchapter 3-4(a) (1980). In those few instances where strict validation is not possible, the procedures and standards still must be shown to be job related. *Id.*

Amici have been involved in a number of cases under Title VII against a variety of federal agencies. In several instances, such agencies have validated their entire selection procedures, including those that involve subjective elements. For example, in *Harrison v. Lewis*, 559 F.Supp. 943 (D.D.C. 1983), the district court, after finding that blacks had suffered discrimination in selections for professional and administrative positions under the disparate impact theory, ordered the agency to revise and validate all elements of its selection process pursuant to the Uniform Guidelines, including subjective rating, ranking, and selection procedures. *See* 559 F.Supp. at 953. Subsequently, the agency commissioned a study by an industrial psychology firm and has reported to the court that they had successfully validated their procedures as ordered. In short, the actual and practical experience of the country's largest single employer, the United States Government, sharply contradicts the contentions advanced by the gov-

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[32] *See* B. Schlei and P. Grossman, *Employment Discrimination Law* 1187 n.5 (2d ed. 1983), for a summary description of the process.

ernment here that subjective criteria are impossible to validate.

CONCLUSION

For the reasons above, if it is appropriate to decide the merits, the judgment of the Fifth Circuit should be reversed.

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Respectfully submitted,

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